United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7481

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 75-7481

ODESSA CARRION,

Plaintiff-Appellant,

-against-

YESHIVA UNIVERSITY,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Did the court below, which dismissed plaintiff-appellant's claim of racial discrimination, err in awarding counsel fees to the defendant-appellee?

2. Did Yeshiva University's dismissal of plaintiff without notice and a hearing constitute state action and deprive plaintiff of due process of law?

3. Did Yeshiva University discriminate against plaintiff on account of her race by failing to promote her on three separate occasions?

4. Did the court below err in refusing to grant plaintiff a short continuance of the trial to present a witness whose testimony would relate to discriminatory practices by the defendant?

STATEMENT OF THE CASE

Proceedings Below

This is an appeal from a judgment and order of the District Court for the Southern District of New York (Knapp, J.) dismissing the complaint herein and awarding defendant, Yeshiva University, a judgment against plaintiff in the sum of $5,000 for counsel fees and $630.36 for costs (131a, 318a).[1/]

In her complaint, the plaintiff alleged: (1) that the defendant[2/] had discriminated against her on account of her color in failing to promote her and in discharging her from her employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (7a, 8a) and (2) that the defendant, in discharging her without notice and a hearing, had deprived her of her liberty and property without due process of law in violation of 42 U.S.C. § 1983 (4a, 8a, 9a).

1/ References to "a" are to the pages of the Joint Appendix.

2/ New York University was originally also named as a defendant. Prior to trial the plaintiff agreed to dismiss her action against this defendant.

At the close of plaintiff's case,[3] the court read an oral opinion in which it found no violation of Title VII of the Civil Rights Act (131a, 132a). Though evidence had been presented, both oral and documentary, in support of plaintiff's claim that defendant's action in dismissing her amounted to state action, and violated her constitutional rights under § 1983, the court said nothing in its opinion about this issue, except for the cryptic remark that "as to the suspension and subsequent firing, I do not reach the question whether it was state action or it was not state action." (131a)

Subsequently, plaintiff and defendant both presented proposed findings of facts and conclusions of law. Defendant's proposed findings confined themselves exclusively to the Title VII violation (286a-302a); however plaintiff's proposed findings included findings relating to the violation of § 1983.[4] The court made no findings at all with respect

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3/ It is plaintiff's contention, see infra, Point IV, that the court improperly denied plaintiff a short continuance of the trial to present an additional witness.

4/ See plaintiff's proposed findings Nos. 43-46. These proposed findings were not accepted by the court and are not reprinted in the Joint Appendix.

to § 1983 but did find, as a conclusion of law, that plaintiff's constitutional rights had not been violated (303a). The court also awarded the defendant counsel fees and costs.

FACTS

In January, 1967, plaintiff, a black woman, was employed by defendant as a Social Work Supervisor in the Department of Social Service at Lincoln Hospital, a city-owned hospital whose professional services were supplied by the Einstein College of Medicine, the medical school of defendant university under an affiliation contract with the City of New York. Plaintiff had a responsible position and came to Lincoln Hospital with an impressive professional background.[5/] She was not only qualified for her job, but exceptionally so. Originally her salary which was $11,000 was paid partly by the city and partly by the defendant; subsequently the defendant paid her entire salary (23a).

Several months after she commenced working for the defendant, the plaintiff learned that a position as Student Unit Supervisor might become available. She spoke to a Mr.

5/ Previous to her position at Yeshiva, plaintiff had been Social Work Supervisor for Columbia University at Harlem Hospital.

Cagan (then the occupant of that position who, it was rumored, was going to be promoted), and indicated her interest in the position. Cagan, in turn, suggested that she see a Professor Leon at New York University who was in charge of the fieldwork aspect of that University's social work program. [6] She wrote to, and met with, Professor Leon, who told her that although no position was then available, she did possess the qualifications for the program. Subsequently, the position of Student Unit Supervisor did in fact become available. Plaintiff again met with Cagan and told him that she would like the position. He informed her that the position paid only $9,500, $1,500 less than plaintiff was then making (30a). Plaintiff pointed out that Cagan had been getting $11,000, but Cagan said that New York University could not pay more than $9,500 (30a). Plaintiff asserted at the trial that at no time did she tell Cagan that she would not take the job (30a), although the court below made a finding that she demonstrated that she was unprepared to take any cut in her salary (290a). [7] Following her meeting with

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6/ The students were from N.Y.U., but were supervised by personnel from Yeshiva University.

7/ None of the references cited by the court support this finding.

Cagan, plaintiff went on vacation and when she returned she found that a white employee, Avis Crocker, had been hired for the position at $10,500 (33a). Plaintiff was never informed that the salary for the position had been raised from $9,500 to $10,500 (170a).

The plaintiff contends that the failure to promote her was discriminatory. The evaluation of the plaintiff by her supervisor was favorable and her supervisor had recommended the plaintiff for the Student Unit Supervisor's position (142a). The evaluation of Crocker was unfavorable and her supervisor recommended that she not be allowed to continue to supervise (304a). Cagan, who made the decision on whom to hire, was aware of these recommendations (171a), as well as other information in Crocker's files indicating that Crocker had left previous positions because she had found it difficult to take guidance and would not assume her responsibilities (171a). Nevertheless Cagan hired Crocker, claiming that he knew her and respected her work (290a). Concededly Crocker turned out to be unsatisfactory and was discharged shortly thereafter. Plaintiff, believing herself to be the victim of discrimination, filed a charge with the Human Rights Commission of the City of New York on August 24, 1967.

Shortly thereafter a second Student Unit Supervisor's position became available and the plaintiff again spoke to Cagan, pointing out that she was qualified for the job. His answer was "uh-huh, yes, of course, we know" (37a).[8/] In September, 1967 the job was filled by a white, Mr. Levy. Cagan's explanation to the plaintiff for giving the job to Levy was that Levy was Cagan's boyhood friend (39a). Plaintiff thereupon amended her charge before the Human Rights Commission to include this second failure to promote.

In December, 1967 Cagan advised plaintiff of a third job, as Director of Social Work in Yeshiva's Neighborhood Maternity Center, a more responsible job than the one she currently had. She was offered $12,500 for the job which was only $500 more than she was scheduled to shortly receive in her present job under the defendant's increment program (41a). For that reason she hesitated about accepting the position; however by that time plaintiff was represented by counsel and pursuant to his advice, she went back to Cagan in January, 1968 and informed him, both orally and in writing, that she would accept the position at $12,500 (44a, 145a).

8/ In the court below the defendant introduced Cagan's testimony before the Human Rights Commission in which he stated that he never spoke directly to the plaintiff about the position.

In February or March, 1968, Mr. Smith, Director of the Neighborhood Maternity Center, called plaintiff in for a conference about the position. She testified that he said to her "The Einstein people are very angry because you filed charges of discrimination against them and this is going to have to be cleared up before we will give you that position" (47a). Mr. Smith denied having made such a statement. In any event, the position was filled in May or June of 1968 by a black woman, Mrs. DeMorrissey, who Mr. Smith was quick to explain, "is a black, a light black; very light black. She could easily pass for white." Mrs. DeMorrissey was paid a salary of $14,000.

Plaintiff thereupon amended her charge at the Human Rights Commission to add an additional allegation of discrimination with respect to this third position which she did not receive (49a).

In April, 1969 hearings commenced before the City Human Rights Commission. In October, 1969 during the course of these hearings, the plaintiff was suspended with pay from her position by Mr. Silverberg, an employee of defendant, who administered the affiliation contract between the City and Yeshiva. In his letter of suspension, Silverberg asserted

that certain of plaintiff's acts were "unprofessional" and "tended to disrupt the effective functioning" of plaintiff's department. The letter also requested plaintiff to stay away from work (152a). Prior to sending this letter Silverberg, although he admitted that the suspension was a serious matter, made no attempt to contact the plaintiff (103a, 104a).

Upon receipt of this letter, plaintiff consulted the National Association of Social Workers, the professional organization of which she was a member, which advised her to go back to work and to write a letter to the administration of the hospital to clarify Silverberg's authority to suspend her (51a). This she did in a letter addressed to Dr. Lubell, the Assistant Commissioner of the hospital, with copies to Silverberg and others in the supervisory hierachy of the hospital (153a). In her letter she asserted that Silverberg had no authority to suspend her, that she had received no hearing, and that she would continue to service her patients since "they would suffer in my absence" and "there is no worker in my unit qualified or trained to take over this complicated and demanding service" (153a). After receiving this letter Silverberg, without giving plaintiff any notice or

holding any hearing, discharged plaintiff for "insubordination" (154a). Following her discharge, plaintiff amended her charge for the third time before the Human Rights Commission, this time alleging that she had been wrongfully discharged from her position (148a).

Defendant contended before the City Human Rights Commission that plaintiff's discharge was due to insubordination as manifested by her letter to Dr. Lubell. Actually, the suspension which preceded the discharge arose from a controversy in the Social Work Department in the fall of 1969. At that time Freda Vasquez, one of the social workers under plaintiff's supervision, complained to plaintiff that the secretaries in the department were disturbed because Cagan had been making sexual advances to them (58a, 59a). The charge was corroborated by Shirley Sanchez, another worker in the department, and at plaintiff's suggestion, she, Vasquez and Sanchez spoke to Dr. Lubell. He said he would look into the charges. Plaintiff then suggested that Sanchez put the incident in writing and a memorandum was drawn by Vasquez but was never signed by Sanchez (60a, 61a, 295a). Shortly thereafter, plaintiff was advised by one of the workers in the mental health division of the hospital that a union representative was circulating a memorandum charging plaintiff

with unprofessional conduct arising out of this incident (62a). The union representative denied it and plaintiff never did see the memorandum (63a). A few days later, plaintiff asked Andre Walker, Assistant Commissioner in charge of Social Work, to call a hearing on the matter. A meeting was called at which Walker directed that those present stop circulating any petition against plaintiff and that if they had any charges to make them directly to him as administrator of the department (67a, 68a).

Silverberg, who suspended the plaintiff, claimed that he took this action because several persons came to him complaining about the plaintiff's conduct (295a), including union leaders who threatened a strike.[9/] Silverberg also discussed the matter with Mr. Shulman, the Assistant Administrator at Lincoln Hospital in charge of labor relations for the City, who had sent him a letter urging that the plaintiff be discharged (233a, 300a).

The Human Rights Commission, Commissioners Colgate and Halpern, heard plaintiff's case and found that she had twice been denied positions as Student Unit Supervisor on account of her race.[10/] The Commission also found that

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9/ There was testimony at the Human Rights Commission that the union leaders never made such threats.

10/ The Commission found no discrimination with respect to the third position for which plaintiff applied.

plaintiff had been discriminatorily discharged. It ordered plaintiff reinstated with back pay. Defendant did reinstate her, but brought an Article 78 proceeding in the New York State Supreme Court to set the ruling aside. The plaintiff was not a party to that suit and did not even learn about it until some time after the Supreme Court decision. Defendant prevailed in the Supreme Court and in the Appellate Division, whereupon plaintiff was discharged a second time. This action followed.

I

THE COURT BELOW SHOULD NOT HAVE AWARDED COUNSEL FEES AGAINST THE PLAINTIFF.

Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides, in part, that in Title VII actions "the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs". Acting pursuant to this section, the court below, although conceding that "discretion should be sparingly exercised in awarding attorneys' fees" against a plaintiff as the entire legislative scheme of Title VII is to "encourage persons aggrieved on racial grounds to come into court" (317a), nevertheless awarded the defendant counsel fees of $5,000. Such an award here goes against the underlying rationale of section 706(k) and should be reversed.

The provision for an attorney's fee in the 1964 Act was not part of the Act as passed by the House. The provision was added during the debate in the Senate, as part of a change in the enforcement mechanism for Title VII cases. As passed by the House, the Act gave the Equal Employment Opportunity Commission (hereinafter "Commission")

power to institute actions in court against persons whom it felt had violated Title VII. An individual complainant, at his own expense, could bring a suit if he secured permission from one member of the Commission. There was no provision allowing the court to appoint an attorney for such individual complainant or for the awarding of an attorney's fee should the complainant prevail.

The Senate substituted a totally different system of enforcement. Under the Senate bill, which later became law, the Commission was deprived of power to institute suits to enforce Title VII violations. Instead, if the Commission could not secure voluntary compliance with its order, it notified the individual complainant who then had 30 days to bring his own suit in court, thus placing on the individual complainant the burden of enforcing the law. Moreover, recognizing that "the maintenance of a suit may impose a great burden on a poor individual complainant," 110 Cong. Rec. 12722 (Senator Humphrey, floor manager of the bill), the Senate added a provision allowing for the court to appoint an attorney for a complainant and authorizing the commencement of an action without the payment of any fees, costs or security. In order to further ease the burden on the

individual complainant, the Senate also provided, in Section 706(k), for the discretionary payment of an attorney's fee to the prevailing party.[11/] Congress thus recognized that if a system of private enforcement was to succeed, provision had to be made for the payment of attorney's fees.

The Court in Neuman v. Piggie Park Enterprises, 390 U.S. 400, 402-403, set forth a rationale for the attorney's fee provision. Although the case before it involved Title II of the Act, its comments are equally applicable to Title VII cases.

> "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private

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11/ This provision was also included in Title II of the Act which dealt with discrimination in public accommodations.

> attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees - not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." (Footnotes omitted)

Given the purposes underlying the attorney's fee provision, awards to prevailing defendants should be sparingly given since "[a] prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest." United States Steel Corporation v. United States, 519 F.2d 359, 364 (3rd Cir. 1975). One simply cannot say that "substantial public policies are furthered by a successful defense against a charge of discrimination." Ibid. Moreover, liberal awards to prevailing defendants would "effectively discourage suits in all but the

clearest cases and inhibit earnest advocacy on undecided issues." Ibid. at 364-365. As one commentator noted, after reviewing the history of § 706(k):

> "The statute's provision for awards of attorney fees to the prevailing 'party' does not mean they should be made to prevailing respondents as liberally as to prevailing claimants . . . . Awards to respondents should be limited to unusual situations, such as defense against clearly fraudulent claims." Walker, Title VII: Complaint & Enforcements Procedures & Relief & Remedies, 7 B.C. Ind. & Com. L. Rev. 495, 506 (1966).

In determining whether attorneys' fees should have been assessed in the instant case, the appropriate inquiry then must be directed toward ascertaining whether the applicant's suit was "frivolous", "baseless", or initiated fraudulently. 110 Cong. Rec. 13668, 14214. A simple summary of the relevant proceedings clearly demonstrates that such is not the case.

First and primarily we call the court's attention to the discussion in Points II and III, infra, as we believe that discussion will demonstrate that plaintiff's cause of action, far from being baseless or frivolous, was in fact a sound one and that the court's dismissal of the complaint was

in error. Plaintiff, even on the truncated trial (see Point IV below), clearly established causes of action under both Section 1983 and Title VII.

Second, we note that plaintiff had filed charges equivalent to her Title VIIclaim in this action before the New York City Commission on Human Rights. That Commission, after extended hearings, decided in her favor on the first two promotions and the dismissal. Speaking of her discharge the Commission said:

> "after a series of events which could give rise to a reasonable inference of discrimination and an obvious improper suspension she was within her rights to challenge that suspension."

The City Commission concluded by stating that:

> "taking this together with respondents' falsification of events to justify their wrongful conduct we are inexorably led to the conclusion that complainant was discharged for no other reason than that she opposed unlawful discriminatory practices."

The City Commission then ordered her to be reinstated with back pay.

We recognize that the Commission's decision was later reversed in the state courts; we also are aware that

the district court ha[illegible] the power to decide the question of violation of Title VII, de novo. Hence we place no reliance on the Human Rights Commission decision so far as the ultimate merits of plaintiff's Title VII cause of action may be concerned. It is however, highly relevant so far as plaintiff's good faith is concerned. The Commission had the best opportunity to hear the witnesses within a relatively short period after plaintiff's discharge and was able to observe the demeanor of the witnesses while their recollections were still fresh. Furthermore, the Commission brought to the hearing a high degree of expertise on the subject of racial discrimination - expertise which may not have been shared by the district court. The ruling in favor of plaintiff, we suggest, establishes that her federal court action could not have been frivolous or baseless. To hold otherwise would in effect imply that the decision of the City Human Rights Commission was likewise frivolous.

Nor is this all. Plaintiff was represented before the Human Rights Commission by a lawyer assigned by the National Association for the Advancement of Colored People,

and in the District court by a lawyer assigned by the NAACP Legal Defense and Educational Fund, Inc. These organizations, as the court well knows, have had extensive experience in this area. To suggest that plaintiff's case was so baseless and grounded in such bad faith as to justify the award of counsel fees against her, implies that the organizations who supplied her with counsel are to some extent guilty of similar bad faith. We find it impossible to make such an implication on this record.[12/]

12/ The court's somewhat intemperate language in his opinion on counsel fees (317a) seems totally unjustified.

The "tissue of lies" to which the court refers is nothing more than a difference of recollection between plaintiff and other witnesses as to events which took place between 1967 and 1969. And all members of minorities who are active in seeking to enforce their rights may, to an outsider, seem to be "motivated solely by spleen" (318a).

The District Court Judge appeared particularly outraged by the contents of the letter which plaintiff sent to her supervisors and which appears in the record as Exhibit 11 (153a). See Trial Tr. 95, 96, 172, 181. We do not understand why that letter so incensed the District Court. The language in the letter may not have been diplomatic but plaintiff was angry and, on her version of the facts, justifiably so. Having in mind that plaintiff was a highly placed professional employee who held a position of considerable responsibility and who had suddenly and without prior notice been informed that she was suspended for "unprofessional" acts, her letter was not, in our opinion, sufficient to justify the court's outrage.

II

YESHIVA'S DISMISSAL OF PLAINTIFF WITHOUT NOTICE AND A HEARING AMOUNTED TO STATE ACTION IN VIOLATION OF THE FOURTEENTH AMENDMENT AND DEPRIVED PLAINTIFF OF HER LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

As we noted above, ante, p. 4 , the court below, in dismissing plaintiff's amended complaint said:

> "As to the suspension and subsequent firing, I do not reach the question whether it was state action or whether it was not state action." (131a)

We do not understand why this was so. Plaintiff's claim under 42 U.S.C. § 1983 was properly pleaded in her amended complaint, it was the subject of pretrial discovery and testimony at the trial, and was separate from her cause of action based on Title VII of the Civil Rights Act. If the court did not reach the issue, its failure to do so constitutes error.

The court did issue conclusions of law, one of which stated:

> "The suspension and discharge of Mrs. Carrion did not deprive her of any rights under the Constitution or laws of the United States." (Conclusion of Law No. 6 (303a)

To the extent that Conclusion of Law No. 6 amounts to a decision (without any findings of fact to support it) that plaintiff did not have a cause of action under § 1983, that conclusion is wrong as a matter of law.

A. Yeshiva's Action In Dismissing Plaintiff Amounted To State Action.

The reach of the Fourteenth Amendment extends beyond actions taken directly by the state or by state officials. When a private agency exercises a governmental function or when the state exercises control over, regulates or becomes involved with the actions of a private agency, the state may not act through that agency, in an unconstitutional manner. As the Court observed in Evans v. Newton, 382 U.S. 296, 299:

> "Conduct that is formally 'private' action may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

There are of course no easy tests to determine the existence vel non of "state action."[13/] Only by "sifting

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13/ The "under color. . ." language of § 1983 is synonymous with the term "state action." United States v. Price, 383 U.S. 787.

[the] facts and weighing [the] circumstances" of a particular situation, Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, can one determine whether state action is present.

Despite the absence of any precise formula for determining the existence of state action there are two general approaches which courts have utilized in deciding this question. The first involves an inquiry as to whether the state has "insinuated itself into a position of interdependence" with the private agency to such an extent that the state becomes a "joint participant" in the challenged activity. Burton v. Wilmington Parking Authority, id. at 725. Pursuant to this approach, courts have examined such factors as the agency's receipt of public funds,[14/] the existence of governmental regulation,[15/] governmental ownership of land or buildings,[16/] and the granting of tax exemptions.[17/]

14/ See, e.g., Simkins v. Moses H. Cohn Memorial Hospital, 323 F.2d 959, 967 (4th Cir. 1963); Farmer v. Moses, 232 F. Supp. 154, 159 (S.D.N.Y. 1954); Bricker v. Sceva Speare Memorial Hospital, 339 F.Supp. 234 (D.N.H. 1972), aff'd. 468 F.2d 1228 (1st Cir. 1972).

15/ See, e.g., Coleman v. Wagner, 429 F.2d 1120, 1124 and 1126-27 (J. Friendly, concurring) (2d Cir. 1970).

16/ See, e.g., Burton v. Wilmington Parking Authority, supra; Hammond v. City of Tampa, 344 F.2d 951 (5th Cir. 1965).

17/ See, e.g., Smith v. YMCA of Montgomery, Inc., 462 F.2d 634 (5th Cir. 1972); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964).

The second, and less frequently employed approach, is to inquire into the nature of the activity involved. State action is found to exist if the activity in question is essentially governmental in nature or amounts to the performance of a "public" function. For example, the maintenance of a public park, Evans v. Newton, supra; the conduct of primary elections, Smith v. Allwright, 321 U.S. 649; the performance of all governmental functions in a company town, Marsh v. Alabama, 326 U.S. 501; the construction of an urban renewal project, Male v. Crossroads Associates, 337 F.Supp. 1190 (S.D.N.Y. 1971), aff'd. 469 F.2d 616 (2d Cir. 1972); and the operation of a voluntary fire company, Everett v. Riverside Hose Company, 261 F.Supp. 463 (S.D.N.Y. 1966) have all been held to constitute "public" functions.[18/]

On either approach, the plaintiff must prevail here.

18/ The two approaches set forth above are not mutually exclusive. At times courts have examined the degree of state involvement in a private activity and have concluded that the existence of extensive municipal involvement itself indicates that the private agency is performing a public function. Thus, in McQueen v. Drucker, 438 F.2d 781, 784 (1st Cir. 1971), the indirect state financial assistance to and extensive state regulation of an urban renewal area landlord, demonstrated that the landlord was performing a public function. See Isaacs v. Board of Trustees of Temple University, 385 F.Supp. 473, 492 (E.D. Pa. 1974).

In the instant case government involvement went far beyond that in any of the cases cited. Here the government owned and operated Lincoln Hospital which was one of the many public hospitals maintained by The City of New York. The City hired the defendant to provide certain professional services, including medical and social work, for the hospital, which was in every essential respect controlled by the City.

This court has dealt with the question of state action in a variety of situations. We need not enumerate nor analyze all these state action cases, for a simple reading of three of them, Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975) and McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971) will be sufficient for present purposes.

In Powe v. Miles, supra, this court was confronted with a challenge, by several students at Alfred University, to the validity of their suspension from the University for failing to obey, following a demonstration, an order of the Dean of Students. In analyzing the elusive concept of state action, the court differentiated between those students who were enrolled in the Liberal Arts College of the University and those who were enrolled at the University's State College

of Ceramics. As to the former, the court held that the University's action in suspending the students did not constitute state action, since that portion of the University was private in character.[19/]

With respect to the students at the State College of Ceramics, however, this court held that the college was an "integral part" of the state, id. at 82, and hence its action in suspending the students was state action. In reaching this conclusion the court relied upon provisions of New York's Education Law subjecting certain colleges, including the School of Ceramics, "to the general supervision and control of the state university trustees" and declaring that such colleges should be administered, with respect to courses of study, creation of departments, employment of faculty and determination of salaries, by Alfred University "as the representative of the state university trustees." 407 F.2d at 75-76. The same law also provided that property and equipment

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19/ The court indicated that the absence of state involvement in the specific action which was being challenged was a factor it considered in reaching this conclusion, 407 F.2d at 81; however, Jackson v. Metropolitan Edison Co., 419 U.S. 345, makes clear that the absence of state involvement in the challenged action is not dispositve on the issue of state action. This court has recently recognized this point. Holodnak v. Avco Corp., supra at 288.

used at the college shall be the property of the state and that the state university trustees shall maintain "general supervision over requests for appropriations and budgets." 407 F.2d at 76. The court finally noted that the students received a "public education,"[20/] that the state furnished the land, buildings and equipment, the entire budget and ultimately, had the authority, if it wished, to change the school's policy on demonstrations which led to the suspension of the students.

A similar symbiotic relationship was found to exist in Holodnak v. Avco Corp., supra, where this court held that a defense contractor's dismissal of an employee amounted to state action. The court noted that the entire acreage on which the Avco plant was built, plus the structures and extensive machinery at the plant, were owned by the United States; that Avco paid no money for the use of the land, buildings and machinery; that a large proportion of work done at the plant was performed under contract for the

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20/ The tuition actually paid by the students at the Ceramics College was substantially less than that paid at the Liberal Arts College, with the differential being met by the state.

Department of Defense; and that the government maintained personnel at the plant "to assure contract compliance, to guarantee control of product quality, and to audit the accounting activities" of the facility, 514 F.2d at 289. The court finally referred to the fact that the enterprise operated for the "mutual benefit" of both parties - it contributed to Avco's financial growth and helped satisfy the government's constitutional duty to raise and support an army. Ibid.

In the third case, McCabe v. Nassau County Medical Center, supra, this court held that the action of a county medical center constituted state action where all that was shown was state funding of the center and state control "fully or in part" of the center's rules and regulations. 21/

The state's involvement and interdependence with Yeshiva's operation of Lincoln Hospital here is very much more extensive than that found to exist in Powe, Holodnak

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21/ The court also noted that some of the doctors who were also being sued might have been paid out of public funds.

and McCabe and a fortiori mandates a finding of state action.[22/]

At the outset we note that Lincoln Hospital is a municipal hospital built with federal and state funds and serves the general public who receive free medical care. The hospital must comply with detailed state and city regulations. See, e.g., Public Health Law § 2800, et seq. The city owns the land on which the hospital is built and all the buildings comprising the hospital. All of the operations of Lincoln Hospital are paid for out of city funds. The affiliation contract between the city and Yeshiva makes it even more clear that the action by the defendant in this case was state action. Although under this contract Yeshiva, in return for the payment of money, provides certain professional services at the hospital, the city retains control over,

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22/ This court's decision in Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1971) is not contrary to Powe, Holodnak or McCabe. There, although the Legal Aid Society had a contract with the city in which in return for a sum of money, it provided legal assistance to indigents facing criminal charges, the court held that no state action was involved in the firing of an attorney. The court relied heavily on the fact that the city did not have "any right whatsoever to intervene in any significant way with the affairs of the Society," id. at 1155, a situation not present in any of the three cases cited above or here.

supervision of and ultimate responsibility for nearly all the activities carried on by Yeshiva at the hospital. Since this contract is fully set forth in the appendix, 226a - 269a, we shall not only several of its more important provisions relating to the question of the city's control and supervision.

1. The city at its own expense provided personnel (except for professicnal services) and supplies to maintain and operate the hospital including all the physical facilities of the buildings and equipment (227a).
2. The city had the responsibility of operating and maintaining the hospital "in accordance with the New York State Hospital Code, The Health Code of the City of New York and in compliance with all statutes and regulations promulgated and enforced by the State of New York and the City of New York or any of its agencies" (227a).
3. General standards of medical and dental services were set forth, including standards of training which must be met by physicians providing such services (230a). Only the Commissioner of

Hospitals, a city official, had the authority to make exceptions to such standards (232a).

4. The establishment of "medical policies and procedures, the organization and operation of the internship and residency training programs," although the responsibility of Yeshiva, were "subject to the general supervision of the Commissioner whose decision shall be final and binding" (237a).
5. The Commissioner had the right to inspect the services rendered by Yeshiva and all records pertaining thereto, to determine whether these services comply with the contract (229a).
6. The Commissioner supervised Yeshiva's administration, supervised the "out-patient department, the emergency service, the admitting unit and the organization and direction of the medical records department" (229a).
7. The Commissioner approved the appointments of most of the key professional personnel who provide services under the contract such as the director of ambulatory patient services (230a), and the directors of medicine, obstetrics and gynecology,

pathology, pediatrics, anthesiology, physical medicine, radiology, surgery and out-patient services (233a).

8. The Commissioner had authority to terminate the services of any person employed by Yeshiva at the hospital if the Commissioner deems such employment to be "not in the best interests of the City" or if any person fails to abide by appropriate rules and regulations (236a).

9. The Commissioner exercised "general supervision" over the assignment and supervision of all interns and residents, and Yeshiva must provide the Commissioner with a list of the monthly assignments of the interns in the hospital (234a).

10. The Commissioner must be notified in advance of the planned absence of more than one day of all directors and supervisors of departments and divisions, and full-time physicians (238a).

11. The Commissioner provided certain forms for use at the hospital (238a).[23/]

23/ See also Yeshiva's Responses 7, 8, 9 to Request for Admissions (223a) and Answer 13 to Interrogatories (213a).

12. The acceptance and administration of grants, gifts and contributions received by Yeshiva from outside sources were subject to the rules and regulations promulgated by the Commissioner and information regarding such gifts and grants must be provided to the Commissioner (240a).

13. The city provided office space and furniture for the business administration personnel that Yeshiva must employ for the purposes of fulfilling their obligations under the contract.

14. Yeshiva was required to submit an audit report to the city and any other information required by the Commissioner with respect to the fiscal operation of the hospital (251a-253a). The books and records of Yeshiva were available for examination by the Commissioner (253a).

15. The City agreed to hold harmless Yeshiva and its doctors and dentists from any liability or damage arising from their malpractice (except where the physician charged a fee for services) (259a).

The arrangement between the city and Yeshiva operated for the "mutual benefit" of both parties. Holodnak v. Avco Corp., supra at 289. The city obtained medical services for its citizens while Yeshiva acquired a teaching hospital for its staff and students.

Moreover the City was directly involved in the suspension and discharge of the plaintiff. Dr. Lubell, the Assistant Commissioner of the hospital, to whom plaintiff wrote her letter of October 29, 1969 (resulting in her discharge) was a city employee (110a-111a). Andre Walker, another person who received a copy of the letter and who played a role in the events leading up to the discharge was Deputy Assistant Commissioner and a city employee (121a). Mr. Shulman, the Assistant Administrator at Lincoln Hospital in charge of Public Relations for the City of New York, another city employee, wrote a memorandum to Silverberg urging that the plaintiff be discharged (283a), and Silverberg acknowledged discussing the memorandum with Shulman prior to discharging the plaintiff (300a).[24/]

Aside from Shulman's memorandum, the City was involved with the plaintiff in other ways. For a time part of her salary was paid directly by the city (211a); her job included the supervision of city employees (214a); equipment (chairs, desks) and supplies, typewriters, machines used in her work were supplied by the city (213a, 217a); her position was listed in the affiliation contract as one which could not be eliminated;[25/] she received at nominal cost, coupons entitling

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24/ Silverberg testified that "Shulman was quite vehement in his attack on us because of our letting this matter go on so long" (114a).

25/ Prior to 1965 and after 1974, appellant's position was held directly by an employee of the City (222a, 224a).

her to meals prepared by the city for persons working at the hospital, and received free medical, dental and optical services at Lincoln Hospital's Employee Health Services facility (215a).

In summary, the state regulated the Hospital, the city owned the land and buildings comprising the Hospital, the city paid all expenses connected with the operation and maintenance of the buildings, equipment and facilities of the Hospital, the city paid public funds to Yeshiva to provide medical services, and the city exercised detailed control, regulation and supervision over all facets of Yeshiva's operation at the hospital. In short, Lincoln Hospital was a public hospital, operated as an integral part of the city's activities. Indeed it is difficult to conceive of a situation where a state or city could be more intimately involved in all aspects of the running of a hospital.

Other circuits have held that actions of private and public medical facilities constitute "state action." Commonwealth of Pa. ex rel Rafferty v. Phila. Psych. Center, 356 F.Supp. 500 (E.D. Pa. 1973). Doe v. Mundy, 378 F.Supp. 731 (E.D. Wisc. 1974), aff'd. 514 F.2d 1179 (6th Cir. 1975); Doe v. Hale Hospital, 369 F.Supp. 970 (D.Mass. 1974), aff'd. 500 F.2d 144 (1st Cir. 1974), cert. den., 420 U.S. 907;

Nyberg v. City of Virginia, 361 F.Supp. 932 (D.Minn. 1972,, aff'd. 495 F.2d 1342 (8th Cir. 1974), cert. den. 419 U.S. 891; Shaw v. Hospital Authority of Cobb County, 507 F.2d 625 (5th Cir. 1975);[26] Meredith v. Allen County War Memorial Hospital, 397 F.2d 33 (6th Cir. 1968); Sosa v. Board of Managers,[27] 437 F.2d 173 (5th Cir. 1971).

26/ A recent 2-1 decision of the Fifth Circuit, Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir. 1975), cert. den., ___ U.S. ___, (U.S.L.Week, Dec. 2, 1975), in which no "state action" was found is not to the contrary. That case involved a private hospital run by a private hospital corporation. The hospital corporation was responsible for the daily maintenance, upkeep and operation of the hospital. Daily operating expenses were the responsibility of the corporation and paid from funds generated by the hospital's services. The corporation set the terms and regulations regarding the surgical and medical care furnished to the public. The corporation kept the city harmless from any liability incurred in operating the facility, and was also required to provide adequate insurance. All of these factors are absent here.

27/ For cases holding that actions of private hospitals receiving state funds or other state benefits or subject to governmental regulations are subject to the requirements of § 1983, see, e.g., Simkus v. Moses H. Cohn Memorial Hospital, supra; Eaton v. Grubbs, supra; Sams v. Ohio Valley General Hospital, 413 F.2d 826 (4th Cir. 1969); Bricker v. Sceva Speare Memorial Hospital, supra; Christhilf v. Annapolis, 496 F.2d 174 (4th Cir. 1974). But see Barrett v. United Hospital, 375 F.Supp. 791 (S.D.N.Y. 1974), aff'd. 506 F.2d 1395 (2d Cir. 1974).

Apart from the significant interdependence between Yeshiva and New York City which in and of itself mandates a finding of state action, the operation of a municipal hospital open to the general public without charge amounts to a public or governmental function.

The importance - indeed essential nature - of hospital and medical care to the maintenance and well-being of our citizens cannot be overstated. The receipt of medical care is obviously one of the basic concerns of all citizens. Its existence is a sine quo non of a stable and well ordered life and contributes to the enrichment of citizens' daily lives.

This has been recognized by the State and City of New York. The New York State Constitution states that "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the State and by such of its subdivisions and in such manner and by such means as the legislature shall from time to time determine." Article 17, Sec. 3. The Constitution's recognition of an obligation to promote and protect citizens' health has been implemented through extensive regulations which are designed to ensure that citizens

receive proper medical care. See Public Health Law § 280, et seq.

The City has also recognized its obligations regarding health and hospital care by providing for a series of municipal hospitals constructed and maintained with public funds which have the primary responsbility for providing, without charge, for the medical care for all city residents.

Regardless of the original role of government vis a vis hospital and medical care, the state and city have now taken such an active part, through regulation and financial support, in promoting and protecting the medical care of its citizens that the maintenance of a public hospital open to the public without charge constitutes a public or governmental function requiring a finding of state action.

The "predominant character and purpose" of a public hospital, no less than a park, fire or police department, is municipal in nature and "traditionally serves the community" Evans v. Newton, supra at 302. Meredith v. Allen County War Memorial Hospital, supra at 35. See, McQueen v. Druker, supra at 784. This is essentially true for Lincoln Hospital which is maintained, operated, regulated, supervised and

controlled by the city, and is open to all without charge.[28] It is operated as an "integral part" of the city's activities, Evans v. Newton, supra at 301, and serves to provide, not only medical care to the citizens, but also valuable teaching experience for future members of the medical profession who, through their experience, will be able to provide benefits to all residents.

B. The Dismissal Of Plaintiff For Alleged Insubordination Without Notice And A Hearing Amounted To A Violation Of Plaintiff's Right To Due Process.

In Board of Regents v. Roth, 408 U.S. 564, the Supreme Court set forth alternative circumstances in which charges levied against a dismissed employee would amount to a deprivation of liberty within the meaning of the due process clause. First, where the charges threaten "a person's good name, reputation, honesty or integrity," id. at 573. Liberty rights are also involved, the Court held, where charges impose a stigma or other disability that foreclose the employee's

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28/ In Lefcourt v. Legal Aid Society, supra, this Court relied, inter alia, on the city's absence of supervision or control over the Society for its finding that the representation of indigent persons did not amount to a public function. Here, that clearly is not the case.

"freedom to take advantage of other employment opportunities." 29/ Ibid. This court has frequently applied these principals in holding that dismissals of employees have violated their liberty rights. Thus in Lombard v. Board of Education of City of New York, 502 F.2d 631 (2d Cir. 1974), the court held that the dismissal of a probationary teacher for reasons of mental illness deprived the teacher of her reputation as a person who was free from mental disorder and hence amounted to a stigma which harmed her chances for future employment. Accord, Velger v. Cawley, ___ F.2d ___, No. 75-7042 (2d Cir., Sept. 9, 1975) (a stigma attached to the summary dismissal of a probationary policeman); Cardaropoli v. Norton, 523 F.2d 990, No. 75-2005, et al. (2d Cir., Sept. 29, 1975) (classification of inmate as a "special case" amounted to a grievous loss and cannot be imposed without due process). Other circuits, relying on Roth, have reached similar conclusions.

29/ In Roth itself the state had merely declined to rehire a teacher who only had a one year contract. In dismissing the teacher the state had not made any charges against him nor did the dismissal amount to a stigma for closing future employment. Hence the court concluded that the teacher did not have any liberty rights.

See, e.g., Rolles v. Civil Service Commission, 512 F.2d 1319 (D.C. Cir. 1974) (dismissal based on accusations of dishonesty injured employee's reputation); Christhilf v. Annapolis, supra (denial of renewal of hospital privileges to a doctor might harm his reputation); Huntley v. North Carolina State Board of Education, 493 F.2d 1016 (4th Cir. 1974) (teacher deprived of liberty by revocation of her certificate based on charges that she procurred it by fraud.

The instant case is no different. Here the dismissal of plaintiff for insubordination clearly casts a blemish upon her "good name, reputation, honesty and integrity," for it reflects upon her professional competence. As an experienced and talented member of a profession with 18 years experience, plaintiff's employment opportunities are seriously jeopardized by the defendant's ex parte action in finding her guilty of insubordination.[30/]

The dismissal of plaintiff also deprived her of property rights. The right of property was spelled out in

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30/ The fact that plaintiff has found another job does not erase the fact that the reason for her dismissal constitutes part of her employment history and is a matter of record open to any prospective employer.

both Board of Regents v. Roth, supra, and Perry v. Sinderman, 408 U.S. 593. In the former case the Court held that to have a property right in a benefit a person must have a "legitimate claim of entitlement to it."[31/] In the latter case the Court acknowledged that an "understanding fostered" by officials may constitute a property right and that these understandings may either be explicitly stated or implied by the circumstances of the position.

This is clearly the case here, for plaintiff was hired for an indefinite period of time and had every expectation of retaining her employment for as long as she was satisfactorily performing her work. Other courts have held that the right to continued education, Goss v. Lopez, 419 U.S. 565, continued employment, Commonwealth of Pennsylvania v. Philadelphia Psychiatric Center, supra, and continuation of staff privileges, Powe v. Charlotte, 374 F.Supp. 1302, 1312 (W.D.N.C. 1974), all constitute property rights.

31/ In Roth the Court ruled that neither the teacher's contract nor any state statute, university rule or policy created any legitimate claim to reappointment on the part of the teacher.

Since liberty and property rights vary greatly, it is difficult to set forth the precise dictates of due process which must be followed for all situations. However, the Supreme Court has made clear on numerous occasions that where, as here, a person's good name, reputation or integrity is at stake, "notice and an opportunity to be heard are essential," Wisconsin v. Constantineau, 400 U.S. 433, 437. The purpose, of course, is to "provide the person an opportunity to clear his name," Board of Education v. Roth, supra at 573.

Recently in Arnett v. Kennedy, 416 U.S. 134, the Court addressed the question of the procedures constitutionally required where a government employee was dismissed for allegedly defaming a superior. There the statute allowed an employee to be dismissed for "cause" and the act and appropriate regulations provided for certain procedures to be followed before the dismissal decision was rendered. These procedures included advance notice of the reasons for the proposed discharge, notice of the material on which the charges were based, an opportunity to respond to the charges both orally and in writing and an opportunity to appear personally before the official charged with making the final

decision on the dismissal. Id. at 140-141. In the event that the pre-termination proceedings resulted in a dismissal, the employee was guaranteed a right to a post-termination administrative appeal in which he received a full trial-type evidentiary hearing before a final decision was reached as to the existence vel non of valid grounds for discharge.

Although there was no majority opinion of the Court, six justices held that an employee who was to be dismissed was constitutionally entitled to certain rudimentary procedural safeguards prior to dismissal.[32/] See Goldberg v. Kelly, 397 U.S. 254; Bell v. Burson, 402 U.S. 535, and Sniadach v. Family Finance Corp., 395 U.S. 337. In the instant case not one of these required procedures was followed and thus Yeshiva's action in dismissing the plaintiff was patently invalid for lack of due process.

32/ Two Justices (Powell and Blackman) concluded that the statute and regulations comported with due process. Four Justices (White, Douglas, Marshall and Brennan) concluded that the pre-termination procedures did not satisfy due process. Only three Justices (Rehnquist, Burger and Stewart) felt that the employee's liberty rights were protected by his post-termination administration hearing.

At the minimum, due process required that the plaintiff should have received notice in advance of dismissal, setting forth the reasons for her proposed discharge, granting her an opportunity to respond to the charges both orally and in writing, and a hearing before an impartial official where she could present witnesses and examine any adverse witnesses. 32a/

32a/ The plaintiff proferred testimony to the effect that after her dismissal she was employed by the Health and Hospital Corporation and that a group of social workers had visited Dr. English, plaintiff's employer, to protest her employment. One of the members of the delegation, and perhaps its leader, was Mr. Russell, who held the position earlier held by Mr. Cagan. The testimony was rejected on the ground that there was no evidence to establish that Mr. Russell had authority from Yeshiva to make such a protest (78a-80a; Trial Tr. 249-254). We submit that the District Court was in error in rejecting the testimony.

In the first place even if the delegation to Dr. English had not been authorized by the defendant, it is relevant on the question of injury to plaintiff's liberty under the Roth case, supra. In the second place Russell's position was of sufficient importance in the defendant's hierarcy so that his authority to act might well be inferred.

III

DEFENDANT DENIED PLAINTIFF THREE
PROMOTIONS ON ACCOUNT OF HER RACE

The plaintiff, a black woman, was hired by the defendant in January, 1967 as a Social Work Supervisor for the Out-Patient Clinic of Lincoln Hospital at a yearly salary of $11,000. During the course of the next 18 months she applied for, but did not receive, three promotions, two of which were given to persons who were white, and the third to a person described as "a light black" who could "easily pass for white." The circumstances under which the plaintiff was denied these positions support the conclusion that her failure to obtain these promotions was due to her color.

In the spring of 1967 the plaintiff learned that a position as Student Unit Supervisor might become available as a result of the contemplated promotion of Mr. Cagan, who then held the position. She also spoke to Cagan who had the power to decide who his successor would be. She informed him that she would like the position if it became available and he told her that, although he was earning $11,000, the position would only pay $9,500 in the future. The plaintiff testified below that at no time did she tell Cagan she would

not consider taking the position at $9,500 (30a). After this conversation the plaintiff went on vacation and upon her return discovered that the position had been given to a Mrs. Crocker, a white person, at a salary of $10,500. At no point had Cagan or anyone else informed the plaintiff that the actual salary would be $10,500, not $9,500.

The court below found that the plaintiff "demonstrated that she was unprepared to take any cut in her salary, which was then $11,000" (290a). There is no basis at all in the record for this finding.[33]

In selecting Crocker over the plaintiff for the position, Cagan ignored the written negative evaluation of Crocker by her supervisor, the positive evaluation of the plaintiff by her supervisor, and the fact that Mrs. Crocker had, at her previous jobs, "found it difficult to take direction . . . to take guidance and would not assume her responsibilities" (171a). The only rational conclusion to be drawn is that reached by the City Human Rights Commission,

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33/ To support this finding, the court below referred to Cagan testimony. However Cagan merely testified that he "felt" the plaintiff would not respond to the fact that the position offered a lower salary than she was currently making.

namely that the plaintiff did not get the position on account of her race and the finding of the court below to the contrary is erroneous. Cagan's explanation that he hired Crocker because he knew her and respected her work lacks credibility; indeed Crocker was unable to do the job and was dismissed.

Shortly after Crocker was hired, a second position as Student Unit Supervisor became available. The plaintiff testified she told Cagan she was qualified for the position and Cagan knew, of course, that she had applied for the same position a few months earlier. His response was "uh-huh, yes, of course, we know" (37a). Once again the plaintiff was passed over for the job; this time Cagan's explanation was that Eli Levy, whom he appointed, was his boyhood friend.[34/]

The third promotion involved a position as Director of Social Work in Yeshiva's Maternity Center. As was true with the first position, the salary offered to the plaintiff was lower than that offered to the person who eventually filled the position. Here, the plaintiff discussed the positions with Messrs. Cagan and Silverberg who

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34/ The finding of the court below (291a) that the plaintiff "did not apply for the position" was based on Cagan's testimony and completely ignores Carrion's testimony of her conversation with Cagan.

mentioned a salary of $12,500, only $500 more than the plaintiff was scheduled to receive in the job she then held, although the new job involved vastly increased responsibilities. According to the plaintiff, she was told "that was all the job would pay" (41a). Initially she hesitated to accept the position but later wrote to Mr. Cagan and told him she would accept the position, even at $12,500 (44a, 145a).

Subsequently, she had a conference with Mr. Smith, Director of the Neighborhood Maternity Center. The plaintiff testified that he told her "The Einstein people are very angry because you filed charges of discrimination against them and this is going to have to be cleared up before we will give you that position" (47a). Smith denied this statement.

In any event, two months later the position was filled at a salary of $14,500, $2,000 more than was offered to the plaintiff. The woman who was selected for the position was described by Smith as "a light black, very light black. She could easily pass for white".

Thus, three times the plaintiff was not selected for positions involving greater responsibility, although in each instance she was admittedly qualified for the positions.

On two of these occasions the defendant misstated to the plaintiff the amount of salary which the job would pay, and on at least two instances, the explanation for not giving the plaintiff the job is not credible.

The suspension and discharge of the plaintiff were likewise motivated by racial considerations.[35/] Without prior contact or consultation with the plaintiff, Silverberg sent her a letter of suspension. The letter was sent by Silverberg while hearings were taking place before the City Human Rights Commission on the plaintiff's charges of racial discrimination. She responded to the letter inquiring as to Silverberg's authority to suspend her and stating that she would continue to work since her patients could not be left without her services. Upon receipt of her letter, Silverberg summarily dismissed her for insubordination. The plaintiff received no notice of any charges or opportunity to examine the charges against her or to present

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35/ The court found, as a conclusion of law, that the plaintiff failed to demonstrate that her suspension and discharge were motivated by racial considerations (302a).

witnesses on her behalf. Indeed Shulman held a grievance hearing in which complaints against plaintiff were aired, but plaintiff was not invited to that hearing and did not even know about it. On its face, these circumstances indicate that the defendant seized upon the plaintiff's letter as an opportunity to discharge a troublesome black employee who had filed, and was actively pursuing, racial discrimination charges against it before the City Commission on Human Rights.[36/]

The motivation for this arbitrary conduct by the defendant was fully explained by the testimony of Richard Weeks who was a non-professional supervisor at Lincoln Hospital (270a, 272a). He had testified before the Human Rights Commission and that testimony was presented to the District Court under the circumstances described in Point IV below. We do not know whether the testimony was accepted by the court at its face value or was treated as an offer of proof and rejected. In any event it was certainly relevant

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36/ The Commission ruled that the dismissal of the plaintiff was in retaliation for the charges of discrimination which the plaintiff had filed.

and in the present state of the record it stands uncontradicted.

Weeks testified that blacks and Puerto Ricans were treated unfairly by the defendant in terms of personnel practices, job evaluation procedures and hiring and firing practices (271a-275a). He testified that black and Puerto Rican workers were not upgraded on terms similar to those applied to whites (272a), and that there had been, in 1969, protests by the employees against such discriminatory practices (271a). He stated further that often black or Puerto Rican workers were discharged under circumstances which would not have resulted in a discharge for white workers (274a). He further testified that when an issue concerning discrimination was raised and a settlement reached (as in the case of a person named Matthews) the defendant failed to keep its agreement (275a). Furthermore when white employees were found incompetent, the administration "found ways to transfer them into other jobs and maintain their livelihood. This never happened in terms of Black workers" (276a).

Mr. Weeks shared plaintiff's confusion as to Silverberg's right to fire workers (273a).

Mr. Weeks was not cross-examined (except for two or three formal questions) before the Human Rights Commission and, of course, he was not cross-examined at all in the District Court. No other refutation of his testimony was attempted. It is against this background that the conduct of the defendant must be measured.

It is not difficult for any employer motivated by racial considerations to find excuses for discharging employees. It is not difficult for any employer to find reasons for discharging an employee who has pressed against it a claim based on racial discrimination. It is for this reason that the United States Supreme Court has made it clear that a prima facie case of statutory violation can be made out merely by proof of the fact that an applicant for a job belongs to a minority group, that he had the qualifications for the job, that he did not get the job and that someone else with no higher qualifications did get it. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802.

It is obvious that in considering the motivation of any employer in a situation such as this, a general pattern of discriminatory conduct is of great importance.

Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975); Blue Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969); Barnes v. Lerner Shops of Texas, 329 F.Supp. 617 (S.D. Tex. 1971).

It is unfortunate that in the instant case the impatience of the Trial Judge did not permit Mr. Weeks to testify more fully or to allow the defendant an attempt to answer his testimony, but that is not the plaintiff's fault. On the face of it his testimony is unchallenged and provides an explanation for the failure of the defendant to give plaintiff an opportunity to explain her version of the circumstances leading to her suspension. Such an opportunity was not given, we respectfully submit, because it would not suit the purpose of the defendant which was to rid itself of a troublesome black employee.

IV

THE COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT PLAINTIFF'S COUNSEL A CONTINUANCE OF A FEW HOURS.

This case came on for trial on Thursday, May 22, 1975 at 2:00 o'clock in the afternoon. It continued for the rest of the day and resumed at 10:00 o'clock Friday morning. During the morning session the court asked counsel how long the case would take and was told that it would take another day (Trial Tr. 117, 118). At the lunch recess the court advised the parties that he would have to recess by 4:15.

After lunch, the trial resumed at 2:00 o'clock (Trial Tr. 215). At 3:00 o'clock plaintiff's counsel advised the court that he had one more witness in court available to testify; that he had had another witness in court who wanted to get back to work at the hospital. Through a "miscalculation," and believing that the witness would not be reached until the next trial day, Mr. Gray, plaintiff's counsel, had excused the witness and so advised the court (Trial Tr. 247; 127a).

The testimony of the witness on hand presumably took about 15 minutes and hence counsel found himself at 3:15 without a witness although there was another hour available

for the trial. Mr. Gray explained that he had made arrangements for the witness to appear on the next day set for trial (Tuesday) but the court in effect refused the continuance after a colloguy which is set forth at Trial Tr. 255-257; 128a, 129a.

Every lawyer who has tried a case and every judge who has heard one understands that on occasion counsel make miscalculations and excuses witnesses prematurely. Especially is this likely to happen near the end of the day and where the witness concerned is not a party to the action but has other and responsible duties to perform. In the instant case at the very most there was an hour of the court's time available for the trial but which could not be used for that purpose. While recognizing that the granting of continuances in such circumstances is a matter for the discretion of the court, we respectfully suggest that that discretion was abused in the instant case; and that the trial should have been recessed until the witness could appear.

This is particularly true when the testimony of the witness was on an important issue, namely the discriminatory policies of the defendant. As we have noted above, p.53, such evidence is of great importance in Title VII cases, and properly so. There is certainly no reason why plaintiff

should be penalized for such a minor and non-intentional inconvenience to the court.

The procedure adopted by the court in lieu of the requested continuance was totally improper. The missing witness had testified before the Human Rights Commission and the court took that testimony and read it in lieu of hearing him in person. In Point III of this brief we have assumed that the court took Mr. Weeks' testimony before the Human Rights Commssion as an offer of proof as to what he would testify if called in the District Court, although the court did not say so and certainly Mr. Gray did not suggest that the court could take the transcript of the previous proceeding as an offer of proof. There is no reason for believing that Weeks' testimony at the court would be identical with the testimony before the Human Rights Commission and that it could be substituted for live testimony. This is not the case of a witness who was not available in the legal sense, but merely one who was prematurely excused by ccunsel through a scheduling error.

Plaintiff was entitled to call whatever witnesses she wished to call in order to prove her case. The premature termination of the trial deprived her of that right. Not

only was the District Court thereby deprived of the full and current testimony of the witness on a central issue in the case, but this court likewise does not have that testimony for its consideration.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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